No. 14-116

In the Supreme Court of the United States

LOUIS B. BULLARD, PETITIONER

v.

BLUE HILLS BANK, FKA HYDE PARK SAVINGS BANK, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Our opening brief recounted the two methods by which the court of appeals believed that debtors could obtain review of a denial of confirmation: the debtor must first obtain, and then appeal, an order confirming a new plan or an order dismissing the case, and then seek to use the appeal to obtain review of the earlier denial. Pet. Br. 29-42. We explained the reasons why each of those indirect methods of obtaining review would be cumbersome, costly, and ineffective.

Strikingly, respondent does not dispute any of that. Respondent does not dispute that obtaining confirmation of an unwanted plan entails expense and delay, and can create reliance interests and oth-

er consequences that cannot be reversed after an appeal. Pet. Br. 30-31. Respondent does not dispute that various Code provisions and the equitable mootness doctrine also make it difficult or impossible to undo a confirmed plan. Pet. Br. 32-34.[1] Respondent does not dispute that many courts will not review interlocutory rulings on appeal from a dismissal, Pet. Br. 38-40, that such a dismissal terminates the automatic stay and therefore may moot or drastically alter any further proceedings, Pet. Br. 40-41, or that obtaining a stay of either a confirmation or dismissal is likely to be difficult or impossible, Pet. Br. 35-37, 40-41.

Thus, while purporting to endorse the rule that only "confirmation[s] or dismissal[s]" are appealable, Resp. Br. 18, respondent offers no reason to believe that either alternative would be an effective route for a debtor seeking appellate review of a denial. Adopting respondent's position would frequently result in elimination, not postponement, of appellate review.

Congress provided for straightforward appeal of denials of confirmation. Respondent's arguments to the contrary are mistaken and inconsistent with the Code. But respondent's position is troubling for an additional reason. The ability of litigants to obtain appellate review of dispositive legal rules—always of great value—is especially important here, since ac-

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[1] While respondent contends (Br. 50 n.8) that the scope of the equitable mootness doctrine is "much disputed, and this Court has never determined its constitutionality," the doctrine has been accepted in some form by every circuit. *See In re Paige*, 584 F.3d 1327, 1337-38 (10th Cir. 2009).

cess to an Article III court is critical where property rights are at issue. *See Northern Pipeline Constr.* v. *Marathon Pipe Line*, 458 U.S. 50, 69-70 & n.23 (1982) (plurality opinion); *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 342 (1816). Yet because bankruptcy courts are not Article III courts, appeal provides the only way petitioner and others in his position can obtain access as of right to an Article III court. The court of appeals' ruling, which would result in limiting and frequently denying such access, should be reversed.

I. DENIALS OF CONFIRMATION ARE FINAL ORDERS APPEALABLE UNDER SECTION 158

Under 28 U.S.C. §158(a) & (d)(1), petitioner can appeal the "final . . . order[]" that entirely concluded the "proceeding" to confirm his hybrid plan. An order denying confirmation is final if it definitively rules on a debtor's substantive rights and leaves no further action for the court to take on the plan, as in this case. *See* Pet. Br. 20-23.

Respondent concedes that "an order terminating a 'proceeding' is immediately appealable as of right, without awaiting termination of the entire 'case.'" Br. 20. Respondent, however, misconceives the scope of a proceeding on plan confirmation. The proposal of a plan begins the confirmation proceeding, which continues with opportunity for objection and amendment. *See* Fed. R. Bankr. P. 3015. When a court grants *or* denies confirmation, the proceeding terminates, and an aggrieved party may appeal. Contrary to respondent's contention, the debtor's

proposal of a new plan does not revive the now-terminated proceeding, but instead begins the process anew.

A. Respondent Concedes a Right to Appeal "Proceedings" in Bankruptcy

Respondent acknowledges (Br. 20) that the unique needs of administering a bankruptcy case led Congress to provide in Section 158 for appeal rights that are "more flexible" than in ordinary civil cases. *See* Resp. Br. 24-26. Nonetheless, respondent relies on inapposite cases arising under Section 1291 to argue for a narrow interpretation of those rights. Respondent fails to account for textual differences between Sections 158 and 1291 and attempts to apply the "single appeal in a case" rule of ordinary civil litigation to constrict the broader right of appeal in Section 158.

Respondent repeatedly cites decisions holding that in ordinary civil litigation under Section 1291, particular rulings that do not resolve an entire case cannot be appealed unless they satisfy the narrow collateral-order doctrine or Fed. R. Civ. P. 54(b). *E.g.*, Resp. Br. 21-23, 37, 39-41.[2] Congress, however, *rejected* that standard when it enacted Section 158. While Section 1291 authorizes appeal only of a "final

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[2] Even under Section 1291, the single-appeal rule is not absolute. *See, e.g.*, *Ray Haluch Gravel Co.* v. *Cent. Pension Fund*, 134 S. Ct. 773, 781 (2014) (rejecting claim that attorneys' fees ruling must be appealed at the same time as other matters); *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (collateral-order doctrine); Fed. R. Civ. P. 54(b) (partial final judgment); *see also* 18 U.S.C. §3731 (government appeals in criminal cases).

decision[]," Section 158 authorizes appeal of a "decision[]" *or* "order[]" that resolves a "proceeding" but does *not* dispose of an entire case. *See United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 269 (2010) (grants of plan confirmation); *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006) (priority status of claim). Respondent's cases explicating the collateral-order doctrine are thus inapposite. Congress's use of the broader term "order," as well as its provision for appeal of a "proceeding," establish its intent to provide a broader right of appeal in bankruptcy. None of respondent's cases, *see* Br. 54-56, addresses the text of Section 158 or the bankruptcy-specific policies that led Congress to provide for a broader appeal right under Section 158.

The fact that petitioner had leave to amend the plan in this case does not affect the Section 158 analysis. Leave to amend may indicate that the entire *case* has not been terminated, *see* 11 U.S.C. §1307(c)(5), but that is relevant only to the Section 1291 analysis. As the parties agree, the question under Section 158 here is whether the *proceeding* on confirmation of the plan—not the entire *case*—has been resolved. Regardless of whether petitioner retained the legal right to amend the plan and thereby continue the bankruptcy case, the denial of confirmation ended the proceeding. Petitioner may therefore appeal.

B. A Denial of Plan Confirmation Finally Terminates a Proceeding

A distinct "proceeding" or "discrete dispute," *Howard Delivery*, 547 U.S. at 657 n.3, begins with

the filing of a plan, continues with litigation of objections, and concludes with the grant or denial of confirmation. *See* Pet. Br. 20-23. Respondent argues (Br. 31), however, that denial of confirmation does not terminate a proceeding, which in respondent's view continues until another plan is ultimately confirmed or the case as a whole is dismissed. That view is based on an incorrect reading of the Code and disregards a key distinction between denials of confirmation and amendments preceding the court's grant or denial of confirmation. If applied consistently, respondent's view would require the rejection of the right to appeal plan confirmations, contrary to settled law. It should be rejected.

1. *Section 157(b).* Section 157(b) lists a series of "[c]ore proceedings" that "[b]ankruptcy judges may hear and determine" without the consent of the parties. Among those are "confirmations of plans." 28 U.S.C. §157(b)(2)(L). As the government explains, "[t]he word 'proceeding' ordinarily refers to a legal process, from start to finish, regardless of the substantive result produced." U.S. Br. 21. Thus, the "proceeding" referred to as "confirmation of plans" is the series of steps from the debtor's filing of the plan up to and including the court's ruling on confirmation, one way or the other. *See* Pet. Br. 21-22.

Respondent's contention (Br. 33) that the process is a "proceeding" only if it results in confirmation disregards the purpose of Section 157(b), which is to establish the statutory authority of the bankruptcy court. *Exec. Benefits Ins. Agency* v. *Arkison*, 134 S. Ct. 2165, 2171 (2014). The court's authority extends to ruling either way on confirmation. It would have

made no sense for Congress to tie the bankruptcy court's authority to the specific outcome reached by the court, and respondent cites no other jurisdictional provision that operates in that way.

2. *Contested matter.* A debtor's proposal of a plan, if met with objection, initiates a "contested matter" under the bankruptcy rules, which terminates with the court's decision to grant or deny confirmation. Pet. Br. 22. After denial, any litigation surrounding a subsequently proposed plan would be a fresh contested matter—not a continuation of the previous proceeding. *See* U.S. Br. 23-25; Bank of America Amicus Br. 13, 15.

Respondent notes (Br. 37-38) that 28 U.S.C. §158(a)(2) labels as "interlocutory" an order increasing or reducing a Chapter 11 debtor's period of exclusivity for proposing a plan, and that such an order also resolves a "contested matter" under the bankruptcy rules. But that in no way suggests that other contested matters, including denials of confirmation, are interlocutory as well. An order regarding the period of exclusivity, being purely procedural, is interlocutory. *See* Pet. Br. 19-20. Such an order involves a matter of timing, and it does not determine the content of any plan or the disposition of any property. But an order denying (or granting) confirmation, which does establish how property may be disposed of, definitively determines substantive rights and therefore is not interlocutory.

3. *Discrete dispute.* The proceeding ending in a denial of confirmation is a "discrete dispute," as *Howard Delivery* used that term. *See* 547 U.S. at 647 n.3. In this case, for example, the denial was

based on the bankruptcy court's definitive conclusion that a hybrid plan cannot be confirmed. That question will not be at issue in any further bankruptcy court proceedings. Respondent argues (Br. 45) that "discrete dispute" is an "amorphous standard" that would "invite endless litigation." This Court in *Howard Delivery* (and the First Circuit in *Saco*), however, employed "discrete dispute" as a useful elucidation of the undefined term "proceeding" in Section 158. Respondent offers no reason to reject it.

4. *Right to amend plans.* Respondent argues (Br. 39) that "the plan process is ongoing" prior to confirmation, because debtors may amend plans under 11 U.S.C. §1323(a) before confirmation. If respondent were correct, then the "plan process" would also be "ongoing"—and no appeal would be permitted—*after* plan confirmation, because grants of confirmation are also frequently followed by modifications. *See* Pet. Br. 25-27. After all, "[a]t any time after confirmation of the plan," debtors, trustees, and unsecured creditors may obtain a modification. 11 U.S.C. §1329(a). Denials and grants are both final, because they decide substantive rights; in this case, for example, no later plan could contain the "hybrid" features that petitioner seeks.

5. *Section 1323(c).* Respondent notes (Br. 34) that a creditor's acceptance or rejection of a plan carries through to later modifications of that plan "unless the modification provides for a change in the rights of [the creditor] . . . and such [creditor] changes [its] previous acceptance or rejection." 11 U.S.C. §1323(c). That rule sensibly provides for a creditor's objection to remain in force until a later plan pro-

vides for a "change" in the creditor's "rights," and it gives the creditor itself the authority to determine if a new or modified plan embodies such a change. Nothing in Section 1323(c)'s rule of convenience, however, suggests that a "proceeding" continues past denial of confirmation. Indeed, the Code provides that the creditor's objection also carries through to *post*-confirmation modifications of a plan. 11 U.S.C. §1329(b)(1). Yet even respondent agrees (*e.g.*, Br. 18) that a "proceeding" terminates on confirmation; if it did not, confirmations would not be appealable. Thus, the fact that objections remain in force does not indicate that the original proceeding is ongoing.

6. *Multiple plans.* Respondent notes (Br. 35) that Chapter 13 provides that the debtor shall file "a plan," that he may modify it before confirmation, and that a plan "as modified becomes the plan." 11 U.S.C. §§1321, 1323(a), (b). Those provisions provide no support, however, for respondent's conclusion that there can be only one plan, much less only one "proceeding" on plan confirmation, in any given bankruptcy.

Initially, respondent's reliance on the singular form ("a plan") disregards the Code's own rule of construction that "the singular includes the plural." 11 U.S.C. §102(7); *see In re Crossroads Ford*, 453 B.R. 764, 769-70 (Bankr. D. Neb. 2011). Section 1321's reference to "a plan" does not limit the debtor to only one plan; to the contrary, the indefinite article presupposes that there can be more than one. Indeed, in a Chapter 11 case, as respondent itself explains (Br. 35), the Code expressly contemplates that the debtor and various creditors may each pro-

pose separate plans, at the same time or seriatim, at least after the debtor's period of exclusivity has expired. *See* 11 U.S.C. §1121(c).

In any event, even if the Code recognized only one plan at a time, that would not suggest that the debtor may not propose a new plan, thereby initiating a new "proceeding," after a court had denied confirmation of an initial plan. In addition to Section 1121(c), other Code provisions recognize the existence of new plans at various points in the bankruptcy, including after the denial of confirmation. For example, Section 1307(c)(5), cited at Resp. Br. 34, provides that a Chapter 13 case may be dismissed after "denial of confirmation of a plan . . . and denial of a request made for additional time for filing *another* plan or modification of a plan." 11 U.S.C. §1307(c)(5) (emphasis added). Similar provisions govern Chapter 9 and Chapter 12 bankruptcy dismissals. *See* 11 U.S.C. §930(a)(5); *id.* §1208(c)(5). The Code's express recognition that the debtor may propose "another plan" after denial of confirmation supports the conclusion that the process leading up to grant or denial of each individual plan is a separate "proceeding."

II. ALLOWING APPEALS OF DENIALS OF CONFIRMATION OFFERS SYSTEMIC BENEFITS FOR THE BANKRUPTCY SYSTEM

Respondent charges that our position would enable "countless appeals" and an "endless automatic stay." Br. 51. Respondent, however, offers only pure speculation to counter the significant evidence of-

fered in our opening brief and by amici that debtors lack the incentive, legal opportunity, and financial means to engage in such delay. Allowing appeals of denials of plan confirmation is the only way to give debtors a fair chance to obtain correction of mistaken legal rules that would otherwise decide their cases. As demonstrated by the briefs of amici Bank of America and the United States, both of which are uniformly *creditors* in bankruptcy cases, such appeals would benefit the bankruptcy system as a whole by affording the opportunity to develop and harmonize the law in a fair, efficient, and evenhanded fashion. No other creditor or creditor's group has supported respondent in this Court. In any event, insofar as any residual doubts remain, numerous safeguards already protect against misuse of the appellate process.

A. Allowing Appeals Would Not Overburden the Courts or Harm Creditors

Although courts have long allowed appeals from multiple orders in the course of a bankruptcy case, amici show that bankruptcy appeals in general are relatively rare. *See* U.S. Br. 32-33; NACBA Br. 26-27. In the particular context of orders denying plan confirmation, very few appeals have been pursued in the courts that have permitted them. *See* Pet. Br. 45-46.[3] When debtors do appeal, they generally seek

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[3] Our search, which we noted was limited to available sources on Westlaw, revealed only three appeals of denials of confirmation to the Fifth Circuit since 2000 (and similar results in the Fourth Circuit on a more limited time period). Pet. Br. 45. Respondent's contention (Br. 56) that the data "present[] a narrow picture" that "excludes unpublished orders and opin-

review of significant legal rulings that have divided the courts and on which appellate guidance is useful for all participants in the bankruptcy system. *See* Pet. Br. 44. Debtors have insufficient resources and no incentive to prolong bankruptcy cases, and they face other formidable obstacles if they should try to do so.

1. *Insufficient resources.* Debtors by definition have little cash available for paying appellate counsel. Additionally, many or most Chapter 13 filings are prompted by the debtor's desire to avoid foreclosure after falling into arrears on mortgage payments, Michelle J. White & Ning Zhu, *Saving Your*

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ions" is wrong. Many unpublished orders and opinions are available on Westlaw, as the citations in our brief (at 45 nn.21-23) show. Respondent cites no case and provides no evidence of any appeal not found by our search.

Respondent also argues that our search was flawed because the Fifth Circuit does not generally allow appeals from denials of confirmation that were "not intended to be final" and that "addressed an issue that left the debtor able to file an amended plan." Br. 56 (quoting *In re Bartee*, 212 F.3d 277, 283 (5th Cir. 2000)). In context, that sentence in *Bartee* addressed the requirement that, to be appealable, a denial must be a definitive ruling that resolves a substantive dispute against the debtor. *Bartee* itself cited several prior Fifth Circuit decisions that had permitted appeals from denials. After *Bartee*, the Fifth Circuit has continued to allow such appeals, without inquiring whether the debtor, having had a first plan rejected on substantive grounds, retains the legal right to file a new plan. *See In re Crager*, 691 F.3d 671, 674 (5th Cir. 2012); *In re Kizzee-Jordan*, 626 F.3d 239, 241 (5th Cir. 2010). Here, too, respondent cites no case in which the Fifth Circuit has *rejected* an appeal of a denial of confirmation.

Home in Chapter 13 Bankruptcy, 39 J. Legal Stud. 33, 37 (2010), and the debtor's need to pay tax debts. To avoid foreclosure, the debtor must continue to make monthly mortgage payments and also pay the arrears during the bankruptcy. *See* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 Tex. L. Rev. 103, 118 (2011). And a plan must "provide for full payment" of priority claims, including many tax debts. 11 U.S.C. §1322(a)(2). If the debtor uses what funds she has to pay appellate counsel, those funds become unavailable to cure a mortgage default, make monthly mortgage payments, or satisfy tax or other priority claims, thus jeopardizing the purpose or even the viability of the Chapter 13 filing. As a result, as amici NACBA and Public Citizen explain (Br. 25), "appeals often depend on [the] attorneys' willingness to handle appeals for little or no compensation."

The mechanics of Chapter 13 attorneys' fees compound the problem. Courts differ on how to determine "reasonable compensation" for an attorney under 11 U.S.C. §330. "[S]ome courts have adopted a 'no look' . . . fee standard," under which the court treats fees under a specified threshold as presumptively reasonable, without a detailed accounting. *In re Claudio*, 459 B.R. 500, 513-14 (Bankr. D. Mass. 2011). Other courts directly apply the "lodestar method" based on a reasonable estimate of the hours needed to litigate the case. *In re Eliapo*, 468 F.3d 592, 598 (9th Cir. 2006). Either way, however, appellate counsel's fees are not included in, and invariably exceed, any presumptively reasonable threshold for bankruptcy litigation. Thus, even if it is theoretically possible for the debtor to find additional funds

for appellate counsel, a debtor taking an appeal must provide a detailed accounting and justification for the extra fees to a court that remains concerned with preserving assets for the estate. *See, e.g.*, *In re Harshbarger*, 205 B.R. 109, 115 (Bankr. S.D. Ohio 1996) ("These Debtors were simply not in a financial position to spend $7,000.00 to challenge by appeal an issue that could have been easily resolved by amending their Chapter 13 plan.").

2. *Incentives.* In any event, a debtor typically has no incentive to delay the case by taking an unnecessary appeal, and any delay will not ordinarily harm a creditor. Respondent's assertions that permitting appeals of denials of confirmation would "harass opponents" and "cost[] creditors money" are mistaken. Resp. Br. 51 (internal quotation marks omitted). Nor would a debtor be likely to have the resources or incentive to appeal "factbound" issues (Resp. Br. 41) that could be reversed only on a showing of clear error.

A Chapter 13 debtor must begin making payments to the trustee "not later than 30 days after the date of the filing of the plan," 11 U.S.C. §1326(a)(1), and continue for three to five years, regardless of when a plan is confirmed or whether there is an appeal. 11 U.S.C. §1325(b)(4). An appeal therefore would not alter the debtor's payment schedule or total amount due, and the debtor ordinarily has no incentive—other than correction of an important and mistaken legal ruling—to take an appeal. While the trustee disburses the debtor's payments to creditors only after plan confirmation, 11 U.S.C. §1326(a)(2), creditors ultimately get the amount to which they

are entitled, regardless of whether an appeal is taken.[4]

Nor does continuation of the automatic stay pending appeal provide any undue advantage to the debtor. The automatic stay is essential to bankruptcy in large part to "provide[] *creditors* with protection by preventing the dismemberment of a debtor's assets by individual creditors." 3 Collier on Bankruptcy ¶ 362.03, at 362-23 (16th ed. 2014) (emphasis added). Indeed, requiring a debtor to obtain dismissal and then attempt (probably futilely, *see* Pet. Br. 38-42) to appeal the dismissal on the ground that the preceding denial was erroneous would threaten the inequitable free-for-all that bankruptcy is designed to avoid.

3. *Sanctions.* Lawyers and parties are subject to a variety of sanctions for misuse of the appellate process. 28 U.S.C. §1927 broadly provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct." Additionally, "Federal Rule of Bankruptcy Procedure 9011—bankruptcy's analogue to Civil Rule 11—authorizes the court to impose sanctions for bad-faith litigation conduct." *Law* v. *Siegel*, 134 S. Ct. 1188, 1198 (2014). Bankruptcy Rule 8020 specifically provides district courts hearing bankruptcy appeals and BAPs

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[4] Chapter 11 also discourages needless appeals because any appeal could run the clock on the debtor's exclusive right to propose a plan. 11 U.S.C. §1121(b).

with authority to sanction attorneys or parties for frivolous appeals. *See* 10 Collier on Bankruptcy ¶ 8020.04[1], at 8020-2 to 8020-3; *In re Rivera*, 494 B.R. 101, 107 (B.A.P. 1st Cir.2013). Bankruptcy courts also have inherent authority to sanction attorneys and parties for misuse of process. *See Law*, 134 S. Ct. at 1194; 11 U.S.C. §105(a).

In addition, a bankruptcy court may confirm a Chapter 13 plan only if it was "proposed in good faith." 11 U.S.C. §1325(a)(3). An unrealistic plan proposed merely to delay proceedings by inviting an appeal would risk denial of confirmation on that basis alone. Because the good-faith inquiry is largely a factual one, the bankruptcy court's determination would be subject to review only for clear error. *See, e.g., In re Young*, 237 F.3d 1168, 1172 (10th Cir. 2001). In addition to the debtor's lack of resources or incentives, these well-established safeguards also undermine respondent's fear of endless or frivolous appeals.

4. *Plan amendments in this case.* Respondent repeatedly points out (*e.g.*, Br. 33, 38-39, 41) that petitioner amended his plan three times before the bankruptcy court denied confirmation. Respondent contends that the amendments somehow "demonstrate the danger in authorizing indiscriminate appeals from denial of confirmation," Br. 41, and that allowing appeals of plan denials would "undercut" the "generous amendment process," Br. 47. To the contrary, this case demonstrates that allowing appeals of plan denials is fully consistent with the normal and productive resolution of issues by the parties themselves.

Petitioner's amendments were largely fact-based, updating the plan to accurately reflect, *inter alia*, the value of petitioner's property, the amount of respondent's claim, and the mortgage terms. Pet. Br. 3. None of the issues involved in the amendments resulted in a judicial decision or order, much less an appeal. Each of the amendments was filed by petitioner *sua sponte*, after objection, ECF Nos. 12, 33, 68, and a conference between the parties, ECF Nos. 14, 43, 73. A virtue of the plan-amendment process is that it avoids judicial involvement in issues that can be resolved by the parties alone, and it served that function here. As is usual, the dispute that did result in an appeal was a fundamental legal disagreement between the parties about the meaning of a Code provision that, as all three courts below recognized, deserved appellate consideration. *See* Pet. Br. 4-8, 43-44. Everything prior to the plan denial was part of the back-and-forth common in bankruptcy cases. Permitting appeals of denials of plan confirmation would not alter that process or the incentive structure that fosters it.

In any event, the "negotiation[s] and compromise[s]," Resp. Br. 31, that would result from respondent's rule are not the sort of healthy ones that the Code envisions. Respondent does not dispute that the only options remaining to a debtor for obtaining appellate review of a denial of confirmation—obtaining, and then appealing, confirmation of a subsequent plan or a dismissal—are cumbersome, expensive, and ultimately ineffective. *See* Pet. Br. 28-42. When a court denies confirmation of a plan based on a legal error, respondent's rule would thus leave the debtor with no choice other than to capitu-

late to the objecting creditor, accept the error, and attempt to salvage whatever other value the bankruptcy process offers. But if the court instead erroneously *grants* confirmation, the creditor can appeal. That does not lead to the kind of "negotiation among parties with equal bargaining power" that is central to bankruptcy cases. Resp. Br. 47.

Indeed, the possibilities for consensual resolution of bankruptcy disputes are likely to be *enhanced* by recognizing the right to appeal denials of confirmation. Amicus Bank of America explains (Br. 23) that respondent's position would "exacerbate the difficulty of obtaining binding guidance from the courts of appeals and foster the uncertainty that pervades bankruptcy law." *See also* Pet. Br. 46-47. Reducing such uncertainty would foster the parties' ability to reach consensual and negotiated solutions.

B. Allowing Appeal Does Not Convert the Automatic Stay into a Stay Pending Appeal

Contrary to respondent's contention (Br. 48), allowing an appeal before a plan is confirmed does not "convert the automatic stay into an automatic stay pending appeal." 11 U.S.C. §362 governs the duration of the automatic stay and the circumstances under which its protections may be reduced or eliminated. Neither Section 362 nor any other related Code provision favors (or disfavors) appeals in any particular context, or extends (or shortens) the automatic stay's duration other than as provided for in Section 362.

1. "The [automatic] stay of section 362 is extremely broad in scope." 3 Collier on Bankruptcy ¶ 362.03, at 362-23. It generally takes effect when the bankruptcy petition is filed and remains in effect until the case is closed or dismissed, or a discharge is granted. 11 U.S.C. §362(a), (c)(2). Nothing in Section 362 hinges the scope or duration of the stay on whether a party has filed an appeal during the bankruptcy case.

Thus, it is true that "Congress did not provide for the automatic stay to continue through the debtor's appeal absent action by the court." Resp. Br. 48. But Congress also did not provide for the automatic stay to *terminate* when a debtor takes an appeal. Congress made the automatic stay turn on other factors. None of them has to with appeals. There is therefore no basis for constricting the appellate rights of debtors (or creditors) to artificially limit the scope of the automatic stay.

Congress did provide that a party may obtain relief from the automatic stay "[o]n request . . . and after notice and a hearing." 11 U.S.C. §362(d). If a creditor believes that it is unduly harmed by the continuation of the automatic stay during a bankruptcy, relief is available under Section 362(d) and related provisions. But Congress nowhere provided that appellate or other rights granted elsewhere in the Code should be eliminated to shorten the duration of the automatic stay. This Court should not accept respondent's invitation to adopt such a rule on its own.

2. Respondent's rule would do more harm than just eliminating appeals of denials of confirmation. In numerous circumstances, the Code permits ap-

peals that are likely to proceed while the automatic stay is in effect, including before confirmation. This Court has held that preconfirmation orders determining the priority of claims are appealable, *Howard Delivery*, 547 U.S. at 657 n.3, and such appeals will frequently occur while the automatic stay remains in effect. Other courts have held that parties may, for example, appeal orders appointing a trustee,[5] determining the extent of the bankruptcy estate,[6] permitting rejection of an executory contract without dismissing the bankruptcy,[7] and substantively consolidating two or more cases.[8] The appealability of each of those orders turns on its own merits, not on the fact that the appeal would be litigated while the automatic stay remains in effect.

3. Relatedly, respondent's attempts (Br. 49-51) to analogize the automatic stay to various efforts to obtain injunctions or stays in non-bankruptcy cases suffer from a basic flaw. In ordinary civil litigation, the status quo remains in effect until a party can persuade a court to grant it relief. In bankruptcy cases, however, Congress provided for an *automatic* stay when the petition is filed. The purpose of the automatic stay is to protect the debtor *and* creditors,

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[5] *See, e.g.*, *Ritchie Special Credit Invs., Ltd.* v. *U.S. Trustee*, 620 F.3d 847, 852 (8th Cir. 2010); *In re Marvel Entm't Grp.*, 140 F.3d 463, 470 (3d Cir. 1998).

[6] *See, e.g.*, *Commerce Bank* v. *Mountain View Vill.*, 5 F.3d 34, 37 (3d Cir. 1993).

[7] *See, e.g.*, *Delightful Music Co.* v. *Taylor*, 913 F.2d 102, 103-04 (3d Cir. 1990).

[8] *See, e.g.*, *In re Bonham*, 229 F.3d 750, 758 (9th Cir. 2000).

by preserving the debtor's estate for a fair and just distribution, rather than the free-for-all that would result in its absence. *See* 3 Collier on Bankruptcy ¶ 362.03, at 362-23.

Once the automatic stay goes into effect, it becomes the status quo in bankruptcy cases. It is *that* status quo that remains in effect throughout the bankruptcy, until closure, dismissal, discharge, or grant of relief from the stay by the bankruptcy court. What respondent seeks is automatically to obtain relief (*i.e.*, the *removal* of the automatic stay) pending the debtor's appeal, without making any showing that such relief is necessary or appropriate. No party in civil litigation is entitled to such special treatment, and respondent is not entitled to it here.

III. RESPONDENT'S OTHER ARGUMENTS SHOULD BE REJECTED

1. *Unfair asymmetry.* Denying debtors the right to appeal from denials of plan confirmation would be unfairly asymmetrical, because grants of confirmation are appealable under settled law. It would also lead to the development of the law in an unbalanced, pro-creditor direction. Pet. Br. 47-48; *see* U.S. Br. 25-26.

Nothing in *Swift & Co. Packers* v. *Compania Colombia del Caribe, S.A.*, 339 U.S. 684, 689 (1950), or the other cases cited by respondent (at 52-53) casts any doubt on that proposition. In *Swift*, the Court held that the collateral-order doctrine authorized appeal of an order vacating the attachment of a vessel in part because later appeal of that order would simply be "an empty rite." 339 U.S. at 689. The

same logic would not authorize appeal of an order *upholding* the attachment because "in such a situation the rights of all the parties can be adequately protected while the litigation . . . proceeds." *Id.* While there was an asymmetry in the right to appeal in *Swift*, it was not unfair because it was based on the need to preserve the right to appeal for both sides.

Other instances of asymmetry are similar to *Swift* and unlike here. A denial of summary judgment, for example, is purely procedural and preserves the substantive issue for appeal after final judgment, while a grant of summary judgment is a substantive ruling that is appealable at the time of the grant or not at all. By contrast, while creditors may freely appeal a grant of confirmation, a debtor who cannot appeal the denial of confirmation will have difficulty obtaining any appellate review at all. *See* Pet. Br. 28-42.

2. *Interlocutory appeal.* Respondent repeatedly contends (*e.g.*, Br. 23-24, 28, 30, 55) that Section 158's provisions for certified interlocutory appeal can safely substitute for appeal as of right of denials of confirmation. Such interlocutory appeals were designed, however, to address individual exceptional cases, not entire categories of cases in which appellate rights should be recognized. Moreover, certified appeals carry with them the overhead of additional litigation directed toward certification that can burden parties and the court. Where, as here, the statute already authorizes appeal as of right, that burden is entirely unnecessary. *See* Pet. Br. 48-50 & n.27.

3. *Final adjudication of rights.* Respondent argues (Br. 35-36) that denials of confirmation are not appealable because "there has been no final adjudication of the parties' rights, as is required for a ruling to be final." If respondent means that no specific property changes hands on denial of confirmation, the same can be said of many rulings that are appealable during bankruptcy. Like a denial of confirmation, an order determining a claim's priority status resolves a legal issue regarding a party's right to relief, but it has no concrete effect until a plan is confirmed (in Chapters 11 or 13) or the estate is distributed (in Chapter 7). Yet this Court held in *Howard Delivery* that such an order is appealable as of right. 547 U.S. at 657 n.3. The same is true of many other preconfirmation orders that have been held appealable. *See* p.20, *supra*.

4. *Clarity.* Respondent mistakenly contends (Br. 43) that our rule would create "uncertainties for courts and litigants to unravel." The standard, however, is clear. A denial of confirmation is final and appealable if it definitively disposes of the debtor's substantive right to the relief sought in the plan.

Respondent hypothesizes (Br. 43) a case in which there are multiple objections to a plan but the bankruptcy court relies on only one to support a denial of confirmation. There is no uncertainty in such a case. The denial is appealable by the debtor but not a creditor, who received full relief when confirmation was denied. If the debtor appeals, a creditor whose objection was overruled can join the other objectors to argue that the plan was correctly denied. If the debtor does not appeal and instead proposes a new

plan with the unsuccessfully objected-to provision intact, the creditor can renew its objection, and has every right to appeal if the new plan is confirmed.

Although there could be marginal cases in which the bankruptcy court's intention to rule definitively is in doubt, the same marginal unclarity can occur in collateral-order cases, many other cases under Section 1291, or, for that matter, cases involving plan confirmations. "[I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality." *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152 (1964). The possibility that such borderline cases may arise does not preclude appeal in other civil contexts, and it should not do so here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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